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NO. 85-1671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AQUAMARINE OPERATORS, INC.,
Petitioner,

v.

IDA E. DOWNER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether given Aquamarine's vacillating, changing and confusing prejudgment interest arguments in the various Texas trial and appellate courts, is this Court going to review the procedural decision of the Texas Supreme Court that Aquamarine did not preserve for appeal its prejudgment interest complaint and thereby waived it?

2. Whether an award of prejudgment interest is appropriate when a Jones Act claim, joined with a general maritime law claim, is tried to a jury when no basis is provided in its answers to special issues for determining which portion of the damage award is attributable to the respective claims.

3. Whether an award of prejudgment interest is appropriate under the Jones Act and the general maritime law on elements of recovery which have not accrued as of the date of judgment.

4. Whether given that Aquamarine's answer was properly stricken for discovery abuse, should Aquamarine nonetheless have been permitted to introduce evidence that Mrs. Downer's deceased husband had volunteered and assumed the risk of working on the broken vessel propeller?

5. Whether contributory negligence under the Jones Act and the general maritime law is solely a damage issue, as opposed to an issue of liability, thereby entitling a defaulting maritime litigant to establish such evidence in mitigation of damages.

6. Whether the application of a local rule of procedure requiring that contributory negligence be affirmatively plead, deprives a defaulting maritime litigant of its federally created substantive right to establish evidence of contributory negligence in mitigation of damages under the Jones Act and the general maritime law.

RULE 28.1 LIST

The interested parties are Petitioner Aquamarine Operators, Inc., represented by Brown, Sims, Wise & White and Mrs. Ida E. Downer represented by John M. O'Quinn.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 28.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL RESPONSE	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
A. INDEPENDENT ADEQUATE STATE LAW GROUNDS	5
B. NO SUBSTANTIAL FEDERAL QUESTION	12
C. ISSUES NOT TIMELY RAISED	17
CONCLUSION	18
APPENDIX A—Opinion of Supreme Court of Texas	A-1
APPENDIX B—Opinion of Court of Appeals	B-1
APPENDIX C—Final Judgment	C-1
APPENDIX D—Plaintiff's First Amended Original Petition	D-1
APPENDIX E—Excerpts from Statement of Facts, Vol. III, pgs. 194-200	E-1
APPENDIX F—Tex. R. Civ. P. 94	F-1
APPENDIX G—Fed. R. Civ. P. 8(c)	G-1
APPENDIX H—Tex. R. Civ. P. 373	H-1
APPENDIX I—Rule 46	I-1
APPENDIX J—Rule 15	J-1
APPENDIX K—28 U.S.C. § 1257	K-1

TABLE OF AUTHORITIES

CASES

	Page
Ake v. Oklahoma, _____U.S._____, 105 S. Ct. 1087 (1985)	6
Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532 (1917)	15
Barron v. James, 198 S.W.2d 256 (Tex. 1946)	15
Brazos Graphics, Inc. v. Arvin Industries, 574 S.W.2d 240 (Tex. Civ. App.—Waco 1978), *writ ref'd n.r.e. per curiam*, 586 S.W.2d 841 (Tex. 1979)	10
Cox v. Esso Shipping Co., 247 F.2d 629 (5th Cir. 1957)	7
Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. Civ. App.—Dallas 1976, no writ)	7
Dutton v. Southern Pacific Transportation, 576 S.W.2d 782 (Tex. 1978)	4
Ellis v. Dixon, 349 U.S. 458 (1955)	15
Flaiz v. Moore, 359 S.W.2d 872 (Tex. 1962)	9
Fonsell v. New York Dock Ry., 198 F.Supp. 332 (E.D. N.Y. 1961)	7
Gulf Consolidated International, Inc. v. Murphy, 658 S.W. 2d 565 (Tex. 1983)	5
Hanson v. Denckla, 357 U.S. 235 (1958), *rehearing denied*, 79 S. Ct. 10	18
Harris v. Harris, 605 S.W.2d 684 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)	7
Henry v. Mississippi, 379 U.S. 443 (1965)	11
Herb v. Pitcairn, 324 U.S. 117 (1945)	6
Herndon v. Georgia, 295 U.S. 441 (1935)	18
Honea v. Matson Navigation Co., 336 F.Supp. 793 (N.D. Cal. 1972)	7
Ida E. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985)	1
Joyce v. Atlantic Richfield Co., 651 F.2d 676 (10th Cir. 1981)	7
Kimbrough v. United States, 364 U.S. 661 (1961), *rehearing denied*, 365 U.S. 825	12
Konigsberg v. State Bar of California, 353 U.S. 252 (1957), *rehearing denied*, 354 U.S. 927	14, 15
Konigsberg v. State Bar of California (II), 366 U.S. 36 (1961), *rehearing denied*, 368 U.S. 869	15
Louisville & Nashville R. Co. v. Woodford, 234 U.S. 46 (1914)	18
Lynch v. Port of Houston Auth., 671 S.W.2d 954 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)	15
McCoy v. United States, 689 F.2d 1196 (4th Cir. 1982)	7

CASES

	Page
Miskin v. New York, 383 U.S. 502 (1966), *rehearing denied*, 384 U.S. 934 (1966)	12
Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950)	4
Neu v. Grant, 548 F.2d 281 (10th Cir. 1977)	16
Port Terminal R. Ass'n v. Inge, 524 S.W.2d 801 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ)	5
Reyes v. Vantage S.S. Co., 558 F.2d 238 (5th Cir. 1977)	7
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)	12, 14
Sibler v. United States, 370 U.S. 717 (1962)	15
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972)	12
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939)	7
Sonenthal v. Wheatley, 661 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.)	15
Southern Pacific Transportation Co. v. Evans, 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) *cert. denied*, 449 U.S. 994 (1980)	4
Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975)	7
State Bd. of Insurance v. Westland Films Ind., 29 Tex. Sup. Ct. J. 255 (March 8, 1986)	5
Staub v. City of Baxley, 355 U.S. 313 (1958)	15, 17
Symeonides v. Cosmar Cia. Naviera, 433 So.2d 281 (La. App. 1983)	4
Tolar v. Kinsman Marine Transit Co., 618 F.2d 1193 (6th Cir. 1980)	7
Wilson v. Loew's, Inc., 355 U.S. 597 (1958)	6
Zucht v. King, 260 U.S. 174 (1922)	12

Page

UNITED STATES STATUTES

28 U.S.C. § 1257(3) 2
45 U.S.C. § 51, et seq. 5
46 U.S.C. § 688 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(c) 2, 4, 19
Rule 46 ..... 2, 16, 19

TEXAS REVISED CIVIL STATUTES

Article 4671 et seq. 2
Article 5525 2

TEXAS RULES OF CIVIL PROCEDURE

Rule 94 ..... 2, 4, 6, 19
Rule 373 ..... 2, 10, 16, 19

SUPREME COURT RULES

Rule 15(1)(h) 2, 12
Rule 16(1)(b) & (c) 2, 12

MISCELLANEOUS

79 A.L.R.2d 553, sec. 10 4

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Respondent Ida E. Downer respectfully opposes the Petition for Writ of Certiorari filed by Petitioner Aquamarine Operators, Inc.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported as *Ida E. Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985), and is reprinted as Appendix A of this response beginning at page A-1; the opinion of the Court of Appeals for the Fourteenth Supreme

Judicial District of Texas (at Houston), reported at 689 S.W.2d 472 is reprinted as Appendix B beginning at page B-1; and the judgment of the trial court is reprinted as Appendix C beginning at page C-1.

JURISDICTIONAL RESPONSE

Petitioner alleges certiorari jurisdiction under 28 U.S.C. § 1257(3) (Appendix K). Respondent challenges Petitioner's jurisdictional statement, and would respectfully show this Court that (1) the judgment of the Texas Supreme Court is based upon adequate independent non-federal grounds, (2) no substantial federal question is present, and (3) Petitioner failed to timely and properly raise certain questions it has presented to this Court.

STATUTES AND RULES INVOLVED

The text of the following statutes and rules appears at the indicated appendices:

1.	Tex. R. Civ. P. 94	Appendix F
2.	Fed. R. Civ. P. 8(c)	Appendix G
3.	Tex. R. Civ. P. 373	Appendix H
4.	Fed. R. Civ. P. 46	Appendix I
5.	Sup. Ct. R. 15(1)(h)	Appendix J
6.	Sup. Ct. R. 16(1)(b) & (c)	Appendix J
7.	28 U.S.C. § 1257(3)	Appendix K

While 46 U.S.C. § 688 (the Jones Act), Tex. Rev. Civ. Stat. Ann. art. 4671 et seq. (the Texas Wrongful Death Act) and Tex. Rev. Civ. Stat. Ann. art. 5525 (the Texas "Survival Statute"), are bases of suit, their construction and applicability are not in issue and therefore not reproduced.

STATEMENT OF THE CASE

This case is not of constitutional magnitude and presents no question of significance or importance except to the private parties involved. Rather, this is a routine personal injury case in which Petitioner Aquamarine Operators, Inc. ("Aquamarine") presents to this Court procedural issues. The decision of the Supreme Court of Texas was eminently correct and does not warrant review by this Court.

Edward P. Downer was killed in the course of his employment for Petitioner Aquamarine. His widow (Ida E. Downer) sued Aquamarine under the Texas Wrongful Death and Survival Statutes, as well as the Jones Act and General Maritime Law (Appendix D). Aquamarine sought no trial court ruling as to which law controls disposition of this case.

As a result of Aquamarine's discovery abuse and refusal to appear for deposition, the trial court properly struck Aquamarine's answer and entered a default judgment on liability against it. Aquamarine no longer challenges the propriety of the sanctions or the entry of the default judgment on liability. Rather, the four questions presented by Aquamarine concern these two procedural issues: (1) Given that Aquamarine's answer was properly stricken for discovery abuse, should Aquamarine nonetheless have been permitted to introduce evidence that Mrs. Downer's deceased husband had volunteered and assumed the risk of working on the broken vessel propeller; and (2) Given Aquamarine's vacillating, changing and confusing prejudgment interest arguments in the various Texas trial and appellate courts, is this Court going to review the procedural decision of the Texas

Supreme Court that Aquamarine did not preserve for appeal its prejudgment interest complaint and thereby waived it?

SUMMARY OF ARGUMENT

1. Since this case was properly filed and prosecuted in State court, Texas procedural law applies.[1] This includes Texas' discovery sanctions rules.[2] The Texas Supreme Court held that the evidence of assumption of the risk was properly excluded because Aquamarine's pleadings were properly stricken as a discovery abuse sanction and a default judgment had been entered on liability. Inasmuch as Texas Rule of Civil Procedure 94 requires the affirmative defenses of assumed risk and contributory negligence be pleaded, and since Aquamarine had no answer because of its own conscious and deliberate violation of the Texas discovery rules, the evidence in question was properly excluded for this reason alone. *Compare* Tex. R. Civ. P. 94 *with* Fed. R. Civ. P. 8(c). (Appendices F & G)

2. Applying Texas procedural law regarding the preservation and appeal of alleged errors, the Texas Supreme Court further held that Petitioner Aquamarine failed to

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1. *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950); *Dutton v. Southern Pacific Transportation*, 576 S.W.2d 782 (Tex. 1978).

2. *See, e.g., Southern Pacific Transportation Co. v. Evans*, 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). *cert. denied*, 449 U.S. 994 (1980) (railroad worker case; defendant's pleadings stricken and defense evidence excluded); *cf. Symeonides v. Cosmar Cia. Naviera*, 433 So.2d 281 (La. App. 1983) (application of state discovery sanctions does not displace essential features of substantive maritime law); *also see generally*, Annot. 79 A.L.R.2d 553, sec. 10.

properly raise, preserve and appeal its prejudgment interest complaint. In this regard, the Texas Supreme Court applied its procedural rule that requires issues to be expressly, specifically and clearly presented to the trial court for a ruling before they may be given appellate review. Texas courts hold this requirement to be jurisdictional, *State Bd. of Insurance v. Westland Films Ind.*, 29 Tex. Sup. Ct. J. 255, 256 (March 8, 1986); *Gulf Consolidated International, Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983), even with respect to cases involving the Jones Act and the Federal Employers Liability Act (45 U.S.C. § 51, et seq.). *See Port Terminal R. Ass'n v. Inge*, 524 S.W.2d 801, 803 (Tex. Civ. App. —Houston [14th Dist.] 1975, no writ).

ARGUMENT

The Supreme Court of Texas decided this case on state law grounds which are both adequate and independent of the federal questions Aquamarine brings forth. None of the issues involve substantial federal questions because of the procedural posture of the case. Indeed, the issues raised in Aquamarine's Petition for Writ of Certiorari were not even discussed by the court of appeals or initially raised by Aquamarine in the Texas Supreme Court by cross-point or conditional application for writ of error. Moreover, the two prejudgment interest issues were not timely and properly raised in the trial court.

A. INDEPENDENT ADEQUATE STATE LAW GROUNDS

The Petitioner admits, as it must, that this Court will refuse to review a state court judgment that rests on an

adequate independent state ground. *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). The test in this regard is whether, after this Court has addressed the state court's action with respect to the federal issue, the same judgment would be rendered by the state court. *Herb v. Pitcairn*, 324 U.S. at 126.

1. Aquamarine does not describe the excluded evidence about which it complains. This failure is probably because Aquamarine knows the excluded evidence was only that Mr. Downer volunteered to do the job he was doing when he drowned, which at most is only improper evidence of assumed risk. The excluded evidence does not indicate that Downer committed some act of negligence in performing his job. (Appendix E)

The Texas Rules of Civil Procedure characterize contributory negligence and assumption of the risk as defenses which must be affirmatively pleaded. Tex. R. Civ. P. 94. (Appendix F) The Texas Supreme Court held that the evidence was properly excluded because Aquamarine had no pleadings to support the introduction of such evidence. This ruling is an independent state law ground. It did not depend on an antecedent ruling on federal law, that is, on a determination whether "federal" error had been committed. *Compare Ake v. Oklahoma*, ____U.S.____, 105 S. Ct. 1087, 1093 (1985). The Texas court's ruling is not so interwoven as to impart a dominant federal "flavor" to it, because *the issue involved here is not the adequacy of Aquamarine's pleadings to raise a federal question but the complete absence of pleading altogether.*

The adequacy of the ruling based on state law is underscored by the fact that had the issue been determined solely as a question of federal maritime law, the same result would have ensued. Only after the jury had retired to deliberate its verdict did Aquamarine present a bill of exception to the trial court regarding the excluded evidence.[3] Despite Aquamarine's characterization of the evidence as being contributory negligence, *all* of the the excluded evidence dealt with Mr. Downer's action in volunteering for the fatal dive. (Appendix E) The federal rule is clear that (1) such evidence constitutes a defense of assumption of the risk, which (2) is inadmissible.[4]

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3. The untimeliness of Aquamarine's bill was discussed by Mrs. Downer in her Reply brief to the Texas court of appeals which was reviewed by the Texas Supreme Court. Under Texas procedural law, excluded evidence must be preserved in a bill of exceptions prepared at the time the evidence is excluded, and in any case, before that party rests its case. The complaining party has the burden to show that the entire contents of the bill is admissible, where, as in this case, the bill was offered in its entirety. *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70, 77 (Tex. Civ. App.—Dallas 1976, no writ). Equally necessary for appellate review, a ruling on the particular excluded evidence must be made on the record. Aquamarine sought no such ruling after making its bill. *Harris v. Harris*, 605 S.W.2d 684, 687 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

4. *See Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 428 (1939); *McCoy v. United States*, 689 F.2d 1196, 1197 (4th Cir. 1982); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682-83 (10th Cir. 1981); *Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193, 1195 (6th Cir. 1980); *Reyes v. Vantage S.S. Co.*, 558 F.2d 238, 244 (5th Cir. 1977); *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5th Cir. 1975); *Cox v. Esso Shipping Co.*, 247 F.2d 629, 635 n.5 (5th Cir. 1957); *Honea v. Matson Navigation Co.*, 336 F.Supp. 793 (N.D. Cal. 1972); *Fonsell v. New York Dock Ry.*, 198 F.Supp. 332 (E.D. N.Y. 1961). Aquamarine's offer of the evidence was limited to its putative right to present such evidence under the federal maritime law. No offer was made in terms of its admissibility in defense of the Plaintiff's state statutory wrongful death and survival causes of action; however, as to its admissibility in defense of the state law claims, its exclusion would have been proper under the Texas Supreme Court's ruling that no pleadings existed upon which introduction could be premised.

Moreover, there is no procedural conflict. Texas' Rule 94 is substantially the same as Federal Rule 8(c). (Appendix G). Application of Texas' procedural rule in this regard would not affect the "uniformity" of general maritime law litigation.

Regardless of the decision this Court would otherwise make regarding a state court maritime defendant's right to introduce evidence of contributory negligence subsequent to the state court's procedural default ruling, the outcome would be the same because of the demonstrable exclusionary nature of the particular evidence in question. As such, the two questions presented by Aquamarine regarding the exclusion of evidence of contributory negligence fail to meet this Court's guidelines for reviewing state court decisions otherwise supportable on state law grounds.

2. The Texas Supreme Court, upon its review of the entire trial and appellate court record, found that Aquamarine waived its prejudgment interest complaint. This holding is correct and consistent with Texas Supreme Court rules and practices and this Court should not go behind that court's determination, inasmuch as it is based on state procedural rules not designed or selectively applied to circumvent review by this Court.

Aquamarine presents two questions with regard to prejudgment interest. At the outset, it must be noted that the second of the two questions; i.e., whether awards for future or "unaccrued" damages are susceptible to prejudgment interest, was never raised by Aquamarine until its motion for rehearing in the Texas Supreme Court, and as discussed later on, has been waived for review in this Court because of its untimeliness.

It is also significant that Aquamarine now resurrects its "joinder" argument,[5] which was the complaint made to the trial court. In the trial court, Aquamarine argued in its "Defendant's Response to Plaintiff's Motion for Judgment" that the simple joinder of a Jones Act claim with a general maritime claim defeated the right to prejudment interest.

In its brief to the state court of appeals, Aquamarine abandoned its trial court "joinder" argument and made a new complaint based on its "jury as fact-finder" argument. That is, its appellate argument was that it was the presence of a jury that barred the right to prejudgment interest, not the pleading and joinder of a Jones Act cause of action.[6] The Texas rules governing appellate procedure prohibit litigants from "crawfishing" theories of error from trial court to appellate court. The theory argued on appeal must be the same theory presented to the trial court for ruling. *Compare Flaiz v. Moore,* 359 S.W.2d 872, 875-76 (Tex. 1962).

Aquamarine says that it "presented several supported grounds for the denial [of prejudgment] interest to the trial court." (Pet. for Writ at 16 n.29).

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5. Ostensibly, Aquamarine's first prejudgment issue presented to this Court is "[w]hether an award of prejudgment interest is appropriate when a Jones Act claim, ***joined with a general maritime law claim,*** is tried to a jury when no basis is provided . . . for determining which portion of the damage award is attributable to the respective claims."

6. On appeal, Aquamarine admitted that a negligent Jones Act court did not bar prejudgment interest, thus backtracking on the joinder issue. It cannot be said that Aquamarine ever told the trial judge that had the court conducted a bench trial on damages, or chosen to use the jury's verdict as advisory only with regards to pure admiralty damages, prejudgment interest might be limited to such claims.

Yet, even Aquamarine itself admits, at least indirectly, that it did not clearly present its appellate complaint to the trial court. Had Aquamarine done so, it could now easily dispatch the matter with one record reference and a brief quote of that portion of the record. However, Aquamarine's motion for rehearing in the Texas Supreme Court amply demonstrates the lack of clarity with which its theory was "presented" to the trial court. In that brief, it went through a 17-page, convoluted explanation of how what it said in the trial court was the equivalent of its appellate complaint. After reading this convoluted explanation, however, one of two propositions is clear: Either Aquamarine did not present its appellate complaint to the trial court, or else presented it in such an unclear fashion that the Texas appellate rule of waiver still applies.

In order to preserve an objection for review in Texas appellate courts, it must be specific and clear enough to be understood by the court. *Brazos Graphics, Inc. v. Arvin Industries,* 574 S.W.2d 240, 242 (Tex. Civ. App. —Waco 1978), *writ ref'd n.r.e. per curiam,* 586 S.W.2d 841 (Tex. 1979); Tex. R. Civ. P. 373 (Appendix H). Obfuscatory complaints, such as the "shorthand" complaint which Aquamarine admits is its only appellate predicate, do not satisfy the need to distinctly point out the basis of a complaint to the judge in order to attack it on appeal.

If it is necessary, as it would be here, to parse the record in the extreme in order to give any merit to Aquamarine's claim, then it cannot be said that the issue was fairly presented to the trial court. The argument Aquamarine made to the Texas Supreme Court on

rehearing, and which it also makes here, to escape the waiver ruling, is premised on picking out single vague words in its post-verdict motions to demonstrate that its complaint had in fact been made.

Aquamarine chastizes Mrs. Downer for responding as she did to its argument on rehearing to the Texas Supreme Court. Yet its own argument would have required that court to raise minute references to the level of a properly preserved complaint. As requested of the Texas Supreme Court such a parsing of the record ignores the reason that Texas appellate courts do not, and should not, judicially notice "code words" unless they are commonly and expectedly used by both Bench and Bar in question. It is no dispersion upon the Texas judicial system to state that it is simply unrealistic to expect the trial judge to pick out single and sprinkled vague references, often admittedly camouflaged in single spaced quotations, from several lenghthy responsive pleadings, and to have acted upon them with the refined imagination Aquamarine would require of him. The theory was subtly, if at all, presented to the trial court, and as presented it would have been extraordinary had the court caught it. As Mr. Justice Harlan has aptly put it:

> A trial judge is a decision-maker, not an advocate. To force him out of his proper role by requiring him to coax out the arguments and imaginatively reframe the requested remedies for the counsel before him is to place upon him more responsibility than a trial judge can be expected to discharge.

Henry v. Mississippi, 379 U.S. 443, 575 (1965) (Harlan, J., dissenting). The Texas rules of procedure are premised on this philosophy.

B. NO SUBSTANTIAL FEDERAL QUESTION

Even assuming arguendo that Aquamarine did not waive its prejudgment interest complaint, the alleged federal question is nonetheless not substantial, militating against a grant of certiorari and review by this high Court. *See Socialist Labor Party v. Gilligan,* 406 U.S. 583, 588 n.2 (1972); *Miskin v. New York,* 383 U.S. 502, 513 (1966), *rehearing denied,* 384 U.S. 934 (1966); *Kimbrough v. United States,* 364 U.S. 661 (1961), *rehearing denied,* 365 U.S. 825.

1. This Court has consistently required more than a showing that the state court decision involved adjudication of a federal right, privilege or immunity to warrant plenary intervention by this Court in the judicial process of a state. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955); Supreme Court Rules 15 (1)(h) & 16(1)(b) & (c) (Appendix J). The issue presented must also be "substantial." *Zucht v. King,* 260 U.S. 174, 176, 177 (1922).

2. This case lacks substantiality in terms of the federal question Aquamarine seeks to raise. Prosecution under the federal maritime laws as well as the Texas law of negligence (via the Texas wrongful death and survival statutes[7]) was not a significant factor in the outcome of the case. Until now, the central issue of this case has been discovery abuse and the trial court's discretion to sanction a recalcitrant litigant, particularly where he fails to appear at the sanction hearing. The

7. Aquamarine did not request for a ruling whether federal maritime law was the exclusive ground of recovery for Mr. Downer's estate or his survivors. Therefore, the resulting judgment should be construed in light of all pleaded causes of action, including State claims.

Texas Supreme Court stated in its opinion that it had consistently urged Texas trial courts to control their dockets by using their sanctioning authority. The judgments of the Texas courts in this case did not focus upon the maritime nature of this case, inasmuch as Aquamarine's liability as a maritime employer and vessel owner was conclusively established by the discovery sanction default judgment.

Unless the issue is whether maritime defendants may flagrantly flout state rules of discovery procedure and avoid the full measure of trial court sanctions under the pretext that they are to be permitted more leniency in state court because of the maritime ("federal question") nature of the lawsuit, then no substantial federal question or other compelling reason exists for review by the United States Supreme Court.

3. The issue whether there was reversible error in the exclusion of Mr. Downer volunteering to work on the propeller presents no substantial federal question because, *inter alia,* the right result was reached regardless of whether the trial court should have premised his ruling on federal exclusionary principles (i.e., that evidence of a seaman's assumed risk is rigorously excluded), or application of state pleading requirements. The result, if not the reasoning, is consistent with federal law. Ironically, the discovery sanctions were imposed because of Aquamarine's refusal to permit the plaintiff to depose the captain and crew of the vessel to determine Aquamarine's basis for alleging contributory negligence on the part of Edward Downer. Thus, the very evidence, the exclusion of which Aquamarine says requires reversal, was deliberately withheld from the prevailing

plaintiff. It would be a gross injustice to vacate the Texas Supreme Court's judgment on the basis that Aquamarine was fundamentally entitled to present evidence it attempted to withhold.

Aquamarine concedes that the only conflict is "in principle" rather than result. (Pet. for Writ at 23, 24) Academic conflicts do not warrant plenary consideration. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

4. The ruling by the Texas Supreme Court that Aquamarine waived consideration of the prejudgment interest issue is not a substantial federal question, either. Aquamarine seeks to endow the waiver ruling with an importance which, in recognition of the Federal-State constitutional framework, has been demonstrably and rightly reserved for analyzing clear attempts by state courts to prevent review by this high Court of decisions of national constitutional import. Citing cases decided by this Court which involve fundamental constitutional due process and civil rights, Aquamarine seeks to impart the imprecise impression that this Court will rarely permit a State court's refusal to consider putative federal rights because of "procedural defaults." The first distinction between the cases cited by Aquamarine and this case is therefore obvious: constitutionally based rights cannot be lightly ignored by local procedural pratfalls.

As state court cases move outside the constitutional arena, however, the need for this Court to scrutinze state court "waiver" rulings decreases, and state court procedural "defaults" correlatively become more significant as valid independent and adequate grounds for this Court to decline review. *Cf. Konigsberg v. State Bar of California*, 353 U.S. 252, 257 (1957), *rehearing denied*,

354 U.S. 927; *Sibler v. United States,* 370 U.S. 717 (1962). In such cases, it is submitted that a state court's ruling is less likely to be categorized as an attempt to evade review by the United States Supreme Court or to be characterized as of such federal importance as to mandate review by this Court. *Konigsberg v. State Bar of California (II),* 366 U.S. 36, 44 (1961); *rehearing denied,* 368 U.S. 869; *Staub v. City of Baxley,* 355 U.S. 313, 329-30 (1958); *Ellis v. Dixon,* 349 U.S. 458, 463 (1955); *Atlantic Coast Line R. Co. v. Mims,* 242 U.S. 532, 535 (1917).

5. The Texas Supreme Court did not create, for this case, a procedural rule requiring clear presentation of objections to trial courts as a prerequisite to appellate review; it did not revive a moth-eaten procedural rule; nor did it selectively apply the rule to Aquamarine with undue harshness.[8] Indeed, the Texas rule itself is no different from the federal rule:

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8. On page 18 of its Petition, Aquamarine accuses the Texas Supreme Court of purposefully "evading" the "federal issue," and, citing two of that court's cases, asks why the waiver rule was applied against Aquamarine. Even a cursory glance at the two cited cases provides easy answer. In *Barron v. James,* 198 S.W.2d 256 (Tex. 1946), the court first noted that, for the particular appellate point in issue, no motion for new trial was necessary. On the other hand, in *Hodge v. Ellis,* 277 S.W.2d 900 (Tex. 1955), the court noted that the trial court's finding had in fact been influenced by the legal doctrine which was asserted on appeal. Likewise, the two referenced to intermediate court opinions, *Lynch v. Port of Houston Auth.,* 671 S.W.2d 954 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), and *Sonenthal v. Wheatley,* 661 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), are inappropriate inasmuch as they are appeals from summary judgments, review of which (as is indicated in those opinions) use different standards which favor the appealing party. Failing to show that it was the victim of arbitrary application of an admittedly long-standing rule, Aquamarine's true point is that the Texas Supreme Court should have waived its waiver rule.

> The purpose for timely objection or motion as a precedent to review on appeal is two-fold. It provides the trial court with the opportunity to know the specific contentions and to take corrective action, if required. And—more importantly for appellate review—it does not permit a party to sit idly by, watching error being committed, and then take a "first" shot at the claimed error without having accorded the trial court the opportunity to correct its action. Such is not allowed. *Johnson v. United States,* 318 U.S. 189, 63 S. Ct. 549, 87 L.Ed. 704 (1943); *Chavez v. New Mexico,* 456 F.2d 1072 (10th Cir. 1972). Further, the objection must be so definite as to indicate to the trial court the precise ground upon which the evidence is inadmissible or the ruling objectionable. *Dow v. United States, for Use and Benefit of Holley,* 154 F.2d 707 (10th Cir. 1946). The trial court is entitled, under this rule, to be apprised of the claimed error, to consider the contention, and to correct possible error. *Baker v. Sherwood Construction Co., Inc.,* 409 F.2d 194 (10th Cir. 1969); *Occidental Petroleum Corp. v. Walker,* 289 F.2d 1 (10th Cir. 1961). The need for specific objection applies to rulings on evidence, formulation of issues for trial, arguments of counsel, submission of the case to the jury, instructing the jury and all other matters throughout the trial. Fed. Rules Civ. Proc., Rules 46 and 51, 28 U.S.C.A., Federal Practice and Procedure, Barron and Holtzoff (Wright Ed.), 2B, § 1021.

Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977); *compare* Fed. R. Civ. P. 46 *with* Tex. R. Civ. P. 373 (Appendices H & I). Given the similarity of purpose and application of the Texas and federal rules, no substantial federal question is present just because the

rule was applied by the State Supreme Court rather than a federal appellate court.

6. Additionally, to the extent that the Texas Supreme Court exercised appellate discretion in declining to address the ill-preserved prejudgment issue, Mrs. Downer respectfully submits that such discretion was not erratically exercised in this particular case. In this regard, review of the Texas Court's discretion ought to be tempered by the fact that the appeal was the result of Aquamarine's own disregard of Texas' rules of procedure. In effect, the Texas Supreme Court was being asked by Aquamarine, the recalcitrant party, to resolve any doubts *in its favor,* to require a whole new trial in an otherwise simple and plain-vanilla case, to allow it "a second bite at the apple" and to come up with admissible evidence of contributory negligence, to rechallenge the Plaintiff's petition with regards to the availability of prejudgment interest such that she could waive a jury and/or permit the trial court to use a jury in an advisory capacity only. With the procedural history in mind and given the fair result of the trial, the Texas Supreme Court's waiver ruling, was appropriate.

C. ISSUES NOT TIMELY RAISED

The Texas Supreme Court did not address one of Aquamarine's two prejudgment issue questions it presents to this Court (No. 2) because it was not timely raised to the trial court. It should not be considered by this Court. *Staub v. City of Baxley,* 355 U.S. 313, 329 n.5 (1958). Similarly, the remaining prejudgment interest question (No. 1) was not raised in the State proceedings until Aquamarine filed its motion for rehearing before the Texas Supreme Court, and therefore, this Court

should refuse to consider it. *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958), *rehearing denied,* 79 S. Ct. 10; *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Louisville & Nashville R. Co. v. Woodford,* 234 U.S. 46 (1914).

CONCLUSION

This is not a "cert-worthy" case. The questions presented by Petitioner Aquamarine were correctly decided. No error occurred. The Texas Supreme Court's decision is based on adequate and independent state law procedural grounds. This Court lacks certiorari jurisdiction. Alternatively, the petition for writ of certiorari should be denied, or the judgment of the Supreme Court of Texas affirmed.

As a discovery sanction, Aquamarine's answer was stricken and a default judgment on liability was entered. That procedural decision, which by the way Aquamarine no longer challenges, made the evidence in question inadmissible.

Likewise, it is Aquamarine's failure to follow Texas procedure that is the basis of the prejudgment interest in question. Aquamarine waived its prejudgment interest complaint by failing to properly raise, preserve and appeal it in the Texas courts. The validity of the Texas Supreme Court's waiver ruling is amplified by Aquamarine's attempt, even at this point on appeal, to weave in a new reason for denying prejudgment interest. The adequate and independent non-federal bases for the State court judgment, and the untimely raising in this Court of a new prejudgment interest complaint warrant a dismissal of the Petition for Writ of Certiorari.

The lack of any substantial federal question is an additional reason for denying a writ of certiorari. Alternatively, it is a very good reason for affirming the judgment of the Texas Supreme Court. No question of national importance is present in this case.

What is important is that substantial justice has been done without threatening the uniformity of Federal Maritime Law. Congress gave concurrent jurisdiction to the state and federal courts to adjudicate seamen's claims with recognition that each state would have different procedural rules. Indeed, state courts are allowed to apply their procedure on discovery rules in equal measure to maritime claims as they are applied to state law claims.

There is nothing about the procedural rules applied by the Texas courts in this case that threatens the federal maritime law. *Compare* Tex. R. Civ. P. 94 *with* Fed. R. Civ. P. 8(c); Tex. R. Civ. P. 373 *with* Fed. R. Civ. P. 46 (Appendices F, G, H & I). The use of discovery sanctions to preclude the introduction of evidence which was willfully not produced during discovery does not threaten the Federal Maritime Law in any unique way. Indeed, federal courts have and use the same procedure rules. Likewise, the use of a procedure rule to find appellate waiver of complaints that were not properly raised and preserved in the trial court or appellate process does not inherently threaten the federal maritime law. Again, the federal courts have similar waiver rules.

This is not a case in which state court has adopted or fashioned a procedural rule to discriminate against a federal law or right. Rather, the Texas Supreme Court applied its procedural rules in a non-discriminatory fashion.

ON THESE PREMISES, Respondent Ida E. Downer respectfully prays that the Supreme Court of the United States deny the Petition for Writ of Certiorari of Aquamarine Operators, Inc., or alternatively affirm the judgment of the Supreme Court of Texas, and for all such further relief to which she is entitled in law and in equity.

Dated: May 9th, 1986.

Respectfully submitted,

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APPENDIX A

Opinion: Supreme Court of Texas
[Now reported at 701 S.W.2d 238]

IDA E. DOWNER,
Petitioner,

v.

AQUAMARINE OPERATORS, INC.,
Respondent.

No. C-4141.

Supreme Court of Texas.

Dec. 4, 1985.

Rehearing Denied Jan. 15, 1986.

WALLACE, Justice.

This is an appeal from a judgment for damages in a suit brought under the Jones Act and under admiralty law. The trial dealt only with damages because the trial court struck the defendant's answer as discovery abuse sanction and signed an interlocutory default judgment as to liability. The court of appeals reversed the trial court judgment, holding that the action of that court was an error of law and an abuse of discretion. 689 S.W.2d 472. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

The issues before us are whether Tex. R. Civ. P. 215(c), as it existed prior to the amendment effective August 1, 1984, authorized the trial court to strike

defendant's answer, and, if so, whether the exercise of that authority constituted an abuse of discretion.

Edward P. Downer was a seaman aboard the vessel Four Point IV. He drowned while attempting to free a line that had fouled the vessel's propeller. Ida E. Downer, his widow, brought this action against Aquamarine Operators, Inc., the owner and operator of the vessel. The case was filed in the 151st District Court of Harris County. Both Downer and Aquamarine are residents of Harris County, Texas.

Downer filed Notice of Intent to Take the Depositions of All Members of The Crew on June 1. The notice identified each crew member, including the captain, Chester P. Dalfrey, by name only. Downer also requested depositions of the immediate supervisor of Chester Dalfrey and the custodian of Edward Downer's personnel file. On June 1, Aquamarine notified Downer that the crew was at sea and would not appear. Aquamarine at that time agreed to produce the requested persons on June 22. On June 21, Aquamarine again notified Downer that the crew was at sea and would not appear. It agreed to produce them on July 5.

Downer filed written Notice of Intent to Take Depositions of the same individuals for July 5. On that date, the requested deponents did not appear, whereupon Downer filed a Motion for Sanctions. A hearing on the Motion for Sanctions was set for August 22. Aquamarine made no appearance at the hearing, the trial court granted the Motion for Sanctions and signed an Order Striking Aquamarine's Answer.

Downer filed a Motion for Interlocutory Default Judgment to which Aquamarine responded. The response

contained Aquamarine's reasons for not producing the requested individuals for depositions and its failure to appear at the sanctions hearing.

The reason offered for the first two occasions was that work for the FOUR POINT IV was scarce and, when work was available, it was necessary to send the vessel and crew to sea rather than produce them for depositions. On the third occasion, the vessel was in port in New Iberia, Louisiana, but Coast Guard regulations required a skeleton crew to be kept aboard at all times. Aquamarine's attorney stated that he notified Downer's attorney on July 1 of the necessity to take the depositions in New Iberia. Downer's attorney stated that he first learned that the individuals would not appear as notice when Aquamarine's attorney called him an hour after the depositions were scheduled to commence. Both agreed that Aquamarine requested the depositions be taken in New Iberia on July 6. However, Downer's attorney stated that he could not do so because he was preferentially set for trial in Houston starting at 9:00 a.m. on July 6.

The reason given by Aquamarine for not appearing at the sanctions hearing was that Hurricane Alicia had struck La Porte, the residence of Mr. Ayres, Aquamarine's lead counsel, four days previously. Mr. Ayres was involved in cleaning up after the hurricane and mitigating the damages to his home. Also, he had a hearing set in federal court in Beaumont on the following day and was directing all of his available attention to that matter.

To his Motion to Reconsider the Sanctions, Mr. Ayres attached an affidavit from his secretary, which stated that

she had called the clerk of the court on July 7, and had advised her that Mr. Ayres had to make a docket call in Angleton. She understood the clerk to say that the sanctions hearing would be reset for September 6. In response to this motion, Downer's attorney advised the court by letter of his version of the circumstances leading up to the non-appearance on July 5, and the time when he as first advised that the named individuals would not appear. Attached to this letter to the court was a copy of a letter dated July 28, written by Mr. Bales, an associate of Mr. Ayres, which confirmed that the sanctions hearing was set for August 22.

With the above information before it, the trial court overruled Aquamarine's Motion to Reconsider the Sanctions and to reinstate its answer. The court signed an order granting an interlocutory default judgment as to liability. Aquamarine filed a Motion to Set Aside the Default Judgment. The motion contained practically the same information as the Motion to Reconsider Sanctions set out above. The trial court considered this motion and overruled it. On April 16, 1984, the case was preferentially set for trial for June 4, and the trial court refused to consider Aquamarine's Second Motion to Set Aside the Interlocutory Default Judgment and Reinstate Defendant's Pleadings.

A jury trial was had in a different court, the 334th District, on the issue of damages. At the trial, Chester Dalfrey testified that he was captain of the FOUR POINT IV and as such he was in complete charge of the vessel with authority over all of its operations. Mr. Clark Ivans testified that he was president of Aquamarine at all times pertinent to this case, and that as such, he was the immediate supervisor of Chester Dalfrey.

[1] We now address the issue of whether the trial court had authority under Rule 215(c) to strike Aquamarine's answer. That rule stated in pertinent part:

> If a party or an officer or managing agent of a party, except for good cause shown, fails to appear before the officer who is to take his oral deposition . . . the court in which the action is pending on motion and notice may strike out all or any part of the pleading of that party or dismiss the action or proceeding or any party thereof.

As noted above, Ivans testified that as president of Aquamarine he was in complete charge of all operations of the company. Thus he was a party as contemplated by Rule 215(c).

[2, 3] The next question is whether the trial court, in refusing to grant a new trial and reinstate Aquamarine's answer, could consider the evidence introduced subsequent to the original sanctions hearing. Aquamarine contends that the trial court, in imposing sanctions, could consider only the evidence before it at the time of the sanctions hearing, and not any evidence subsequently produced. A trial court's plenary jurisdiction gives it not only the authority by the responsibility to review any pre-trial order upon proper motion. In doing so, it is presumed that the court is familiar with the entire record of the case up to and including the motion to be considered. The plenary jurisdiction of the trial court in this case continued through the final judgment and overruling of Aquamarine's motion for new trial. When considering the motion for new trial, the court had before it the reasons advanced by Aquamarine for not appearing for depositions or the sanctions hearing; Downer's response to

Aquamarine's motion; and the evidence produced at the trial on damages. Thus, the court of appeals erred in holding that the trial court did not have authority under Rule 215(c) to strike Aquamarine's answer.

We now turn to the court of appeals holding that the trial court abused its discretion in striking Aquamarine's answer. The court of appeals concluded its review of the abuse of discretion issue by stating: "The facts of the case simply do not, in our opinion, show this to be an appropriate case to impose the ultimate sanctions of striking the pleadings and entering default judgment." We interpret that statement to mean that the court of appeals disagreed with the decision of the two trial judges who reviewed the matter.

[4] The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. *Craddock v. Sunshine Bus Lines,* 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. Comm. App.—1939, opinion adopted). Another way of stating the test is whether the act was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Co.,* 665 S.W.2d 439, 443 (Tex. 1982); *Landry v. Travelers Insurance Co.,* 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Southwestern Bell Telephone Co. v. Johnson,* 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn,* 321 S.W.2d 290, 295 (Tex. 1959).

To determine the trial judge's guiding rules and principles in imposing sanctions for discovery abuse, we must look to the Texas Rules of Civil Procedure as promulgated and amended by this Court as well as the decisions of appellate courts of this State and of the United States. The Texas Rules of Civil Procedure pertaining to discovery and sanctions for noncompliance have been amended several times, culminating in Rule 215a as it existed at the time of the case, and now embodied in Rule 215. The use of sanctions by trial courts to prevent discovery abuse has developed steadily over the past several years. These changes reflect the continuing pattern both to broaden the discovery process and to encourage sanctions for failure to comply.

The United States Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778, 49 L.Ed.2d 747 (1976) approved the use of sanctions not only to assure compliance with the discovery process but also to deter those who might be tempted to abuse discovery in the absence of a deterrent.

This court and various courts of appeals have also followed this progression. *See, e.g., Dyson v. Olin Corp.*, 692 S.W.2d 456 (Tex. 1985), (Kilgarlin, J., concurring) (unnamed witness not permitted to testify); *Jarrett v. Warhola,* 695 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd), (plaintiff's cause of action dismissed); *City of Houston v. Arney,* 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ) (defendant's answer struck for failure to answer interrogatories); *Southern Pacific Transportation v. Evans,* 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979,

writ ref'd n.r.e.) (defendant's answer struck and interlocutory default judgment rendered as to liability), *cert. denied,* 449 U.S. 994, 101 S. Ct. 531, 66 L.Ed.2d 291 (1980).

In various speeches and law review articles, different members of this court have encouraged trial judges to use sanctions to the degree necessary to assure compliance with discovery procedures and deter abuse of the process. Barrow and Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 St. Mary's L.J. 713 (1984) (presented to the Texas College of the Judiciary Nov. 29, 1984); Kilgarlin and Jackson, *Sanctions for Discovery Abuse Under New Rule 215* 15 St. Mary's L.J. 767 (1984); Pope and McConnico, *Practicing Law With the 1981 Texas Rules,* 32 Baylor L. Rev. 457 (1981); Spears, *The Rules of Civil Procedure: 1981 Changes in Pretrial Discovery,* 12 St. Mary's L.J. 633 (1981).

The trial court in this case was free to examine the factors before it to determine whether to levy sanctions. Among these were the following: (1) whether voluntarily sending the crew to sea rather than producing them for depositions as agreed on two occasions was in conscious disregard of this court's rules; (2) whether the contradictory statements of both attorneys indicated that Aquamarine's attorney did in fact wait until one hour past the scheduled time for depositions on July 5, to advise Downer's attorney that he would have to fly to New Iberia and take depositions on the following day; (3) whether Aquamarine's attorney consciously disregarded the sanctions hearing in preference to his personal needs and the federal court case set the following day;

(4) whether the information contained in the secretary's affidavit as to the date of the sanctions hearing conflicted with the letter from an attorney in that law firm confirming that the hearing was set on August 22; and (5) the unexplained failure of Aquamarine to produce for depositions on any of the occasions in question Clark Ivans, the immediate supervisor of Chester Dalfrey and the president of Aquamarine.

[5] The record contains no indication that the trial court was capricious, arbitrary, or unreasonable. Thus, the court of appeals erred in holding that the trial court abused its discretion.

In determining whether to reverse and render this cause or to remand it to the court of appeals, we must look to the four points of error raised by Aquamarine before the court of appeals but not addressed by that court. If those points raise questions of law, as opposed to questions of fact, they can be addressed by this court.

The first point was that Downer's First Amended Original Petition was insufficient to support the judgment. The contention is that the facts supporting the cause of action were not pleaded. Tex. R. Civ. P. 47 requires that a petition contain a short statement of the cause of action sufficient to give fair notice of the claim involved. Our rules do not require pleadings to contain evidence or factual detail. That point is overruled.

[6] The second point was that the trial court improperly refused to strike a juror for cause. After the court had ruled on challenges for cause, there were 26 names left on the jury list. Each party was given six jury strikes, so, after making those strikes, 14 names re-

mained on the list. The challenged juror was Number 14 and was thus a spare. There was no harm in refusing to dismiss him for cause.

[7] The third point was that the trial court improperly refused to admit evidence of Downer's contributory negligence. Contributory negligence is an affirmative defense which must be pleaded. Aquamarine's answer had been struck and default judgment rendered as to liability. Thus, defendant had no pleading to support contributory negligence, so the court did not err in refusing to admit the requested evidence.

[8] Aquamarine's remaining point before the court of appeals was that the trial court erred in awarding prejudgment interest in a Jones Act case tried to a jury. This point was not presented to the trial court and was thus waived.

Aquamarine's points of error presented to the court of appeals but not considered by that court concerned questions of law over which we have jurisdiction. There is no merit to these points so it is not necessary for this cause to be remanded to the court of appeals.

The judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

APPENDIX B

Opinion: Court of Appeals
[Now reported at 689 S.W.2d 472]

AQUAMARINE OPERATORS, INC.,
Appellant,

v.

IDA E. DOWNER,
Appellee.

No. C14-84-635CV.

Court of Appeals of Texas,
Houston (14th Dist.)

Feb. 28, 1985.

Rehearing Denied April 4, 1985

ROBERTSON, Justice.

Aquamarine Operators, Inc. appeals a judgment for $1,685,988.00 entered after the trial court struck its pleadings as a discovery sanction. The controlling issue on appeal is whether those sanctions were proper. After a careful review of the record, we believe the court's action was erroneous and accordingly reverse and remand the cause.

The facts forming the basis of this lawsuit can be briefly summarized. Appellee's husband died while working as a seaman on appellant's vessel. Appellee brought a wrongful death action under the Jones Act and general maritime law. After appellant's answer to this pleading

was filed, appellee issued notice to take oral depositions of eight people. These people was scheduled for depositions three times, twice by notice and once by agreement, but appellant notified appellee on two of those occasions that they were unable to attend because their vessel was "out at sea." On the day following the last of these two notices, appellee filed a motion for sanctions and a hearing on that motion was set. Only the appellee appeared at that setting and the judge thereafter entered an order striking appellant's answer. The trial court subsequently refused to set aside his order granting sanctions, and after a jury trial was held solely on the issue of damages, judgment was entered against appellant.

While appellant raises six points of error challenging the judgment, we believe the first two points are dispositive of the appeal. Appellant first contends that the trial court erred as a matter of law in striking its answer because Rule 215a, Texas Rules of Civil Procedure, which contained discovery sanctions applicable at that time, permitted the trial judge to strike a party's pleadings only when a "party or an officer or managing agent" failed to comply with a discovery request. Thus, it argues, since the witnesses here noticed for deposition were not parties, this particular sanction was not an available option. We agree.

[1] To properly address this issue, we first turn to the then applicable language of rule 215a.

> Failure of Party or Witness to Attend. If a party or an officer or managing agent of a party, except for good cause shown, fails to appear before the officer who is to take his oral deposition or his answers to written questions or cross-questions under

> these rules, after proper service of subpoena or notice as provided in Rule 201, the court in which the action is pending on motion and notice may strike out all or any part of the pleading of that party, or dismiss the action or proceeding or any part thereof, or direct that such party shall not be permitted to present his grounds for relief or his defense, or enter a judgment by default against that party, or make such other order with respect thereto as may be just.
>
> Any *witness* who, except for good cause shown, fails to appear before the officer who is to take his oral deposition or answers to written questions or cross-questions under these rules, after proper service of subpoena, may be punished as for contempt of the court in which the action is pending or of the district court in the district in which such deposition or answers are to be taken, and an attachment may issue out of such court for such witness, as in ordinary civil cases. (Emphasis added.)

Tex. R. Civ. P. 215(c) (Vernon 1976). This rule obviously makes a distinction between parties and witnesses. *See Barrientos v. Texas Employers' Insurance Association,* 507 S.W.2d 900, 903 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.). It therefore becomes our task to determine whether the trial court had sufficient information before it to decide if the requested deponents fell within the "party" category. We are guided in this determination by the principle that the movant, here the appellee, had the burden of proof before the trial court. *See Mobile, Inc. v. Cone,* 457 S.W.2d 175, 176 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.).

[2] The record before us reveals that only certain pertinent information was before the trial court at the time the sanctions were granted. It included a notice of deposition filed May 4, 1983, requesting the appearance of the following persons with no further designation of their status:

1. William Balou;
2. Chester P. Dalfrey;
3. Ross Pearce;
4. Clifford Crider;
5. Ernest Richardson;
6. Donald Doswell;
7. The supervisor of Chester P. Dalfrey;
8. Custodian of the entire personnel file for Edward Pierce Downer.

A second notice contained an identical listing. The actual motion for sanctions itself was the only document indicating that any of the requested deponents were anything but crew members. This motion, sworn to by appellee's attorney, referred to "the entire crew as well as the captain's supervisor and a member of Aquamarine Operators to discuss the fringe benefit program for the Decedent." At the time the sanctions were granted the requested deponents had not been further identified in any of the papers before the court.

It is also noteworthy that there evidently was not a "hearing" on the motion for sanctions. The "Notice of Submission" notified appellant that the motion would

be heard on July 18, 1983, "without the necessity of an oral hearing *unless one is requested by you.*" (Emphasis supplied). While this hearing was reset to August 22, neither appellant nor this counsel appeared on that date (as will be shown later on) and neither the order granting sanctions nor the docket sheet reflects the court heard any evidence.

Even stretching these listings and sworn statements to the point of implications, we do not believe the trial court had sufficient evidence before it to characterize any of the noticed persons as "a party or an officer or mangaging agent of a party" as required by the rule. The crew obviously does not fit into any of those categories. While the supervisor of Chester Dalfrey, the captain,[1] might be considered a managing agent of the *vessel,* this bears no relationship whatsoever to the required category, that is, a managing agent of the *party,* Aquamarine Operators.[2] *See Davis v. Sea Fresh Fisheries, Inc.,* 1983 A.M.C. 1165 (W.D. Wash. 1981). The noticing of the custodian of records, alternatively referred to as a member of Aquamarine Operators, is equally ambiguous. Such a designee need not, by definition or implication, be an official of the corporate party. Under this record it was not possible for the court to determine that any of these people were parties, or officers or

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1. Although Chester Dalfrey was eventually identified as the captain, the trial court record did not specifically contain an identification of him as such at the time the sanctions were granted.

2. In her brief, appellee states that the notice of deposition required appellant to produce "its President as the supervisor of Captain Dalfrey." The record before us indicates that the record available to the trial court at the hearing on sanctions is devoid of any information indicating that the president of Aquamarine Operators had been noticed.

managing agents of the party defendant, Aquamarine Operators. Consequently the court could not, as a matter of law, strike appellant's pleadings under the dictates of rule 215a.

While we believe that the trial court did not have the authority to impose this sanction, of equal importance in our decision is the issue of whether that action constituted an abuse of discretion. *See Bass v. Duffey,* 620 S.W.2d 847, 849 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). We are aware of the recent judicial trend of taking firmer action for discovery abuse. *See e.g.,* Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215,* St. Mary's L.J. 767 (1984). Although we believe the facts here did not present an appropriate case for the extreme discovery sanction imposed, in light of the trend to the contrary, we will carefully detail the series of events leading to the trial court's granting of the motion for sanctions.

Plaintiff-appellee filed her original petition on January 27, 1983. On May 4, 1983, she filed the first notice of intention to take depositions on June 1, 1983. On June 1, appellant's attorney called appellee's attorney and informed him that he had just been notified that the crew was out at sea and therefore was unavailable for the deposition. The two attorneys then informally agreed to reset the depositions for June 22, 1983. On June 21, appellant's attorney told appellee's attorney that the crew was again at sea and would not be able to attend the deposition scheduled for the next day. Appellant's attorney suggested that the crew would be able to attend a July 5 deposition in Houston, and appellee's attorney thereafter noticed a deposition for that date and location.

There is some dispute as to the next turn of events. In a response to the motion for sanctions, appellant's attorney stated under oath that on July 1, he contacted counsel for appellee and requested that the depositions be taken in New Iberia, Louisiana, where the crew's vessel was docked. The crew was unable to go to Houston as scheduled because a skeleton crew had to remain with the vessel at all times. He further stated that appellant chartered a plane and informed appellee's counsel that they would fly him to New Iberia at their expense. On the morning of July 5, appellant's counsel called counsel for appellee to give him directions to the airport where the chartered airplane was waiting. He was informed by the secretary that appellee's attorney was out of the office. That afternoon appellant's attorney was notified that appellee's attorney refused to make the trip. In an *unsworn* letter to the court (in answer to appellant's response to the motion for sanctions), appellee's attorney asserted that appellant's recitation of the events of July 1 was "blantently false." He stated that appellant's attorney did not contact him at all on July 1, and in fact did not call him until 10:00 a.m. on July 5, one hour after the deposition was to begin. Appellee's attorney told the court that only at this point did counsel offer to fly him to New Iberia, which request he did refuse because he was preferentially set for trial the next day.

The next day, July 6, appellee filed her motion for sanctions, and the hearing thereon was set for July 18, 1983. Appellant responded to this motion, detailing the above-described events. Appellee responsed to this with the unsworn letter, pointing out inaccuracies in appellant's allegations. The trial court had all of this informa-

tion before it at the time it signed the order granting the sanctions on August 22.

While this summarization completes the chronological facts leading to the granting of sanctions, several other factors significant to the court's decision are also presented in the record. First, appellant's attorney had a number of reasons for not appearing at the hearing. Hurricane Alicia came through on August 18, and appellant's attorney, who lives in La Porte, suffered storm damage to his residence as a result thereof. Appellant's attorney was also scheduled for trial on August 22. Finally, and perhaps most importantly, appellant's counsel's secretary filed an affidavit indicating that she had been told the hearing was scheduled for *September 6*, 1983. She stated that the clerk of the trial court called her to confirm the availability of the August 22 hearing date. The secretary checked counsel's calender and found a conflict on that date. She called the clerk and notified her of the conflict, at which time they agreed on the September 6 date. The clerk said she would call appellee's counsel to confirm that date with him, and that she would call the secretary back only if there was a problem. The clerk did not return the call, so she assumed the September 6 setting was correct. These scheduling problems certainly are of some value in the decision to strike pleadings.

Appellant points out further facts for our consideration. First, the very nature of its business is such that it is difficult to produce the crew for deposition. When the crew ships out, they often spend substantial periods of time offshore. The crew would often have to return to an offshore oil patch shortly after arriving onshore. Further-

more, because of the currently depressed offshore oil industry, appellant suggested that they found it necessary to take work whenever they could find it, even if before a scheduled deposition. Secondly, none of the deponents resided in Texas, making it difficult to attend a Houston deposition.

We also note that appellee apparently never sought *only* the harsh sanction imposed. In the motion, appellee's prayer was in the alternative—either strike the pleadings and enter default judgment *or* award attorney's fees for the three days lost. In appellee's letter (referenced above) to the court, appellee reasserted the request for sanctions "and in addition, would at least ask this Court to enter an Order compelling the Defendant to produce its crew within thirty (30) days" for depositions.

The very timetable of this cause indicates a factor for consideration regarding abuse of discovery. The cause had been on file less than eight months, and the motion for sanctions was granted less than four months after the first notice of deposition. Although the motion itself was on file for over a month when the motion was granted, appellee's attorney was on vacation from July 28 until August 18. In a sworn affidavit, an attorney from appellant's firm said that he spoke with appellee's attorney before he left on vacation in an attempt to reschedule the depositions before the sanctions hearing. Since such rescheduling was impossible, appellant's attorney asked him to pass the hearing on the motion for sanctions and promised that he would produce the crew upon counsel's return. Appellee's attorney said that he would not pass, but that he would not request the court to strike appellant's pleadings but rather would only ask for an order compelling the crew member's appearance.

[3] Under the state of the record, we cannot hold that the trial court did not abuse its discretion. While the depositions were scheduled twice formally, and once by agreement, this is not outrageous in light of the explained nature of appellant's work. The appellate record does not indicate that appellant's crew ever actually refused to appear, but rather evidences that appellant requested reschedulings due to their unavailability. Although there are some conflicts in the various versions of the facts, these conflicts, along with the short time between the first scheduled deposition and the granting of sanctions, clearly presented a vague enough situation that the judge should not have resorted to striking appellant's pleadings. Though we certainly can understand the court's apparent irritation at appellant's counsel's failure to appear at the sanctions hearing, the subsequent response outlining his reasons for non-appearance further fortifies our belief that the court abused its discretion.

Appellee places significant reliance on *Wiley v. Browning*, 670 S.W.2d 729 (Tex. App.—Tyler 1984, no writ). We believe this reliance is misplaced. In that case a party-defendant to a lawsuit failed to appear for a noticed deposition. After this single absence, the plaintiff filed a motion for sanctions. A hearing was held, and the trial court granted the motion and defaulted the defendant. The Tyler court found the trial court had not abused its discretion. We do not find the decision controlling here because we believe there are several distinguishing factors. First, the defendant there never notified the plaintiffs that he would not be present. Secondly, he did not offer to appear at a later date for his deposition, and when questioned by the court, the defendant

stated "I let my wife handle all the business she could, and I didn't want to be bothered with it." Finally, the parties had informally agreed to depositions on "several" prior occasions, but none of these had resulted in the taking of a deposition. This is easily contrasted with this case, where appellant, although cancelling depositions, made efforts to reschedule them each time. Furthermore, the cancellations did not appear to be deliberate evasions, but rather were a result of appellant's work conditions.

Appellee also relies upon the recent case of *City of Houston v. Arney,* 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ) where the court approved the granting of sanctions by striking the defendant's answer and entering default judgment. The facts of that case do not, however, compare with the facts of this case. In *Arney,* answers to interrogatories were due six months prior to the striking of defendant's answer. During this time an order was issued compelling answers, which order was completely ignored by the defendant. No action was taken by the defendant until plaintiff's motion for sanctions was filed. This is easily contrasted with appellant's repeated attempts to reschedule depositions in the four months period between the first notice and the order striking its pleadings.

We find comfort in the language of the United States Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L.Ed.2d 747 (1976):

> [T]he most severe in the spectrum of sanctions [dismissal or default] provided by statute or rule must

> be available to the district court *in appropriate cases*, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. (Emphasis added).

The facts of this case simply do not, in our opinion, show this to be an appropriate case to impose the ultimate sanction of striking the pleadings and entering default judgment.

In conclusion, we hold the granting of the discovery sanctions constituted both an error at law and an abuse of discretion. Having thus disposed of appellant's first two points, it is unnecessary to discuss the remaining points.

The judgment is reversed and the cause remanded with instructions to reinstate appellant's answer.

APPENDIX C

FINAL JUDGMENT

FINAL JUDGMENT, SIGNED JUNE 22, 1984. ENTERED: Volume 2782, Page 449, General Minutes, District Courts, in and for Harris County, Texas

NO. 83-08655

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

FINAL JUDGMENT

Be IT REMEMBERED that on the 8th day of June, 1984, came on to be heard the above cause after it had been set for trial in due manner with reasonable notice to all parties at a regular term of this Court and appeared in person Plaintiff IDA E. DOWNER, Individually and as Executrix of the Estate of EDWARD DOWNER by and through her attorneys of record, and appeared the Defendant AQUAMARINE OPERATORS, INC., by and through its corporate representative and attorneys of record, and all parties announced ready for trial.

Thereafter, the parties through their attorneys, conducted a voir dire examination of a panel of qualified jurors and were permitted to exercise all their challenges for cause and peremptory challenges and a jury of 12 qualified jurors was duly selected and sworn in as the jury in this cause.

Thereafter, the parties made their opening statement and presented their evidence until the 14th day of June, 1984, when all parties announced in open Court that they rested and had no further evidence to present.

Thereafter, the Court prepared a written charge of special issues to be submitted to the jury and tendered that charge to the attorneys for examination and inspection and gave them full opportunity to present objections to the charge. Thereafter, the Court read its written charge to the jury, and then the parties, through their attorneys, were allowed to present oral argument to the jury. Thereafter, the jury was retired to deliberate its verdict.

Thereafter, on the 14th day of June 1984, the jury returned in open Court and announced through its foreman that it had reached a verdict on all issues in the Court's charge. Thereafter, in open Court and the presence of the jury and the attorneys for the parties, the Court determined that the verdict was properly signed and rendered by 10 members of the jury and then read aloud the verdict and the jury's answers to the special issues. Thereafter, the Court inquired of the attorneys whether there was any objection to receiving the verdict and there being none, the Court ordered that the verdict be received and filed among the papers of the cause. Thereafter, the jury was discharged.

Thereafter, Plaintiff filed her Motion for Judgment. The Court heard such Motion, including the Motion and supporting evidence of Plaintiff, IDA E. DOWNER, individually and as Executrix of the Estate of EDWARD DOWNER, for prejudgment interest, and found that

Plaintiff is entitled to judgment for all the damages awarded by the jury in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00) plus prejudgment interest at the rate of 8.67% as proven by the Plaintiff, plus costs of court and post-judgment interest.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff, IDA E. DOWNER, Individually, recover of and from Defendant AQUAMARINE OPERATORS, INC. the sum of One Million Six Hundred Eighty Five Thousand Nine Hundred Eighty Eight Dollars ($1,685,988.00), consisting of $1,450,000 plus prejudgment interest in the amount of $235,988.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff IDA E. DOWNER, as the Executrix of the Estate of EDWARD DOWNER, recover of and from Defendant AQUAMARINE OPERATORS, INC., the sum of Fifty Eight Thousand One Hundred Thirty Eight Dollars ($58,138.00), consisting of $50,000 plus prejudgment interest in the amount of $8,138.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all recoveries granted herein are to bear interest at the legal rate of 10% from and after the date that this Judgment is rendered until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff is to have the right to writs of execution upon the property of Defendant and all the rights and remedies for the collection of judgments if this judgment is not timely paid.

SIGNED and RENDERED this the 22nd day of June, 1984.

/s/ KEN HARRIS
Judge Presiding

APPROVED:

O'QUINN & HAGANS

/s/ JOHN O'QUINN
John O'Quinn (TBA #15296000)
3200 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 223-1000
Attorney for Plaintiff

APPENDIX D

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION. FILED: JUNE 14, 1983. RAY HARDY, District Clerk, Harris County, Texas. By L. Clark, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS

PLAINTIFF'S FIRST AMENDED
ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW IDA E. DOWNER, Individually and in her capacity as Executrix of the Estate of Edward Pierce Downer, complaining of AQUAMARINE OPERATORS, INC., heretofore incorrectly named as AQUAMARINE OPERATORS, and for cause of action would show to the Court the following:

I.

Plaintiff is a resident citizen of Houston, Harris County, Texas. IDA E. DOWNER sues in every capacity and for every element of damage to which she is entitled by reason of the matters made the basis of this suit, includ-

ing damages under the Wrongful Death Act and the Survival Statute of the State of Texas.

The Defendant, AQUAMARINE OPERATORS, INC., is a Texas corporation doing business in Texas for the purpose of accumulating monetary profits. This Defendant was heretofore incorrectly named as AQUAMARINE OPERATORS. This Defendant has been served with citation and has filed an answer in its correct legal capacity and is before the Court for all purposes. The Plaintiff hereby amends her Petition in accordance with Texas Rule of Civil Procedure 71 so that the Defendant, AQUAMARINE OPERATORS, INC., is properly designated.

II.

It has become necessary to bring this lawsuit on account of a very serious and tragic accident which occurred on or about August 7, 1982, in Morgan City, La. At the time of the accident, Edward Pierce Downer was a member of the crew of the Vessel, Four Point IV, which was owned or otherwise in the control and possession of and operated by the Defendant, AQUAMARINE OPERATORS, INC. While working aboard the Vessel Four Point IV, Edward Pierce Downer drowned. The death of Edward Pierce Downer and the ensuing damages suffered by his estate and by his surviving wife, IDA E. DOWNER, were proximately caused by the failure to exercise ordinary care on the part of the named Defendant, acting by and through its agents, servants and employees who were acting within the course and scope of their employment at the time of the occurrence in question. Further, nothing that the deceased Edward Pierce Downer, did or failed to do caused or contributed to the cause of his death.

III.

The Plaintiff seeks all her remedies under the general law of maritime and admiralty. Plaintiff would show that Defendant, AQUAMARINE OPERATORS, INC., assigned Edward Pierce Downer to the vessel, Four Point IV, to work and in that connection, caused him to work as an able-bodied seaman upon the vessel. On the date in question, Edward Pierce Downer was working upon the Four Point IV vessel within the course and scope of his employment for AQUAMARINE OPERATORS, INC. The Four Point IV vessel was defective and unseaworthy and said conditions were a producing cause of Edward Pierce Downer's death.

IV.

This action arises out of admiralty. Plaintiff maintains this action to recover all damages due her under the Jones Act, the law of admiralty, the Death on the High Seas Act, and the law of negligence. This action is maintained to recover all pre-judgment interest as well as legal damages.

V.

IDA E. DOWNER is the surviving wife of Edward Pierce Downer. As the widow and representative of the Estate of Edward Pierce Downer, IDA E. DOWNER seeks to recover all damages to which she may be entitled because of the injuries and death of Edward Pierce Downer, including, but not limited to, pecuniary loss, loss of services, care, guidance, advice and counsel, loss of consortium, companionship, society, affection and grief. IDA E. DOWNER also asserts in her capacity as representative of the Estate of Edward Pierce Downer a

claim for conscious pain and suffering of Edward Pierce Downer as a result of the injuries which ultimately caused his death. Such damages greatly exceed the minimum jurisdictional amounts of the Court. Plaintiff reserves the right to amend and state further with respect to her damage.

VI.

Plaintiff would further say and show that the Defendant, AQUAMARINE OPERATORS, INC., was grossly negligent and as a result of such conscious and indifferent regard for the rights and lives of others the Plaintiff is entitled to recover exemplary damages from the Defendant.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendant be cited in terms of law and commanded to appear and that the Court grant the Plaintiff's judgment for all the damages plus pre-judgment interest, post-judgment interest, punitive damages, costs of court, and such other and further relief, at law or in equity, to which they might be justly entitled.

Respectfully submitted,

O'QUINN & HAGANS

/s/ MICHAEL KERENSKY
Michael Kerensky
(TBA #11331500)
3200 Texas Commerce Tower
600 Travis
Houston, Texas 77002
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, MICHAEL KERENSKY, hereby certify that a true and correct copy of the foregoing Plaintiff's First Amended Original Petition was served upon all attorneys of record by mailing same by way of Certified Mail, Return Receipt Requested on this 15th day of June, 1983.

/s/ MICHAEL KERENSKY
Michael Kerensky
Attorney for Plaintiff

APPENDIX E

Excerpts from Statement of Facts, Vol. III, pgs. 194-200
Date: June 14, 1984

STATEMENT OF FACTS. FILED: SEPTEMBER 28, 1984. MARY JANE SMART, Clerk, 14th Court of Appeals, Houston, Texas

THE COURT: All right, Counsel. Bailiff, retire the jury.

(Whereupon, the jury retired to deliberate.)

BILL OF EXCEPTION

(The following proceedings were had out of the presence of the jury:)

MR. BALE: Judge, this will constitute our bill of exceptions with respect to our contention that we are entitled under the Admiralty and Maritime Law to present the issue of contributory negligence of the plaintiff's decedent, although pleadings have been stricken and involve a judgment that has been entered against.

CAPTAIN CHESTER DALFREY

was called as a witness for the Defendant and, after having been previously duly sworn, testified as follows:

EXAMINATION

BY MR. BALE:

Q. Would you state your name for the record, please?
A. Chester Dalfrey.

Q. Captain Dalfrey, you gave us your qualifications and background earlier, so I won't go into that at this point, but I would like to do is call your attention to August 7th, 1982, the date on which Mr. Downer died.

Why don't you just tell us when you first became aware that a decision was being made to send a crew member over the side?

A. That was when we arrived back at Transocean dock.

Q. All right. Where were you when you pulled up to the dock?

A. I was in the wheelhouse.

Q. In the wheelhouse?

A. Uh-huh.

Q. What was the first thing that you did when you discovered that the line was in the wheel and after you moored the vessel, Four Point Four, off the docks?

A. The first thing I did when we had rope in the wheel, I called the diving company.

Q. Okay. Is that your usual and customary practice when you get a line in the wheel?

A. Yes.

Q. All right. What did you do after that, if anything?

A. Well, I went back to Transocean dock on one engine and we tied up there and I went downstairs and Ed and the mate were talking about our problem.

Q. How long had you been at the docks before you walked out on the deck and overheard this conversation between Ed and the mate?

A. Oh, about five or ten minutes.

Q. Were they already engaged in this discussion at the time you walked out on the back deck?

A. Yes.

Q. All right, What, if anything, was being said at the time you walked up to them?
A. They were just talking about, you know, going down and checking the prop out to see how bad the rope was in the wheel.
Q. Who was carrying the burden in that conversation? That is, who—were you able to determine from listening to the conversation basically whose idea it was?
A. No.
Q. Okay. They were just equally discussing it, equally?
A. Right.
Q. Okay. During the course of those conversations, or during the course of that conversation, did you personally get involved in it?
A. Yes, I did.
Q. Okay. Did Mr. Downer ever relate to you that he done this before on prior occasions?
A. Yes, sir.
Q. All right. Did he give you the impression that he was experienced in diving under vessels to check the extent of the entanglement of a line and prop?
A. Yes.
Q. Did you at any time ever order, command or otherwise instruct Ed Downer to dive under the Four Point Four?
A. No.
Q. Did he do it voluntarily?
A. Yes.
Q. Did he seem, before he dove off of the gunwheel and under the boat, did he seem apprehensive or terrified about going into the water?
A. No.
Q. Did he seem confident?
A. Yes.

MR. BALE: Your Honor, that will conclude our bill of exceptions on this matter.

THE COURT: All right.

MR. BALE: And I guess for purposes of the record, that's the bill of exceptions of Aquamarine Operators.

Thank you, Judge.

THE COURT: Anything further?

MR. BALE: No, sir.

THE COURT: You may step down, sir.

VERDICT

THE COURT: We have a verdict.

APPENDIX F

Tex. R. Civ. P. 94. Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance of affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issues unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

APPENDIX G

Fed. R. Civ. P. 8(c). Affirmative Defenses.

In pleading to a preceding pleading, a party shall set fourth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designed a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

APPENDIX H

Tex. R. Civ. P. 373. Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has theretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Source: Federal Rule 46, unchanged.

APPENDIX I

Rule 46. Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

APPENDIX J

Rule 15. Jurisdictional Statement.

.1. The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:

* * *

(h) A statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

* * *

Rule 16. Motion to Dismiss or Affirm——Reply—Supplemental Briefs.

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

* * *

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

* * *

APPENDIX K

28 U.S.C. § 1257. State court; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

* * *